S.B. CIVIL WRIT PETITION NO.2463/2005

Kamal Kishore Asopa Vs. Smt. Pratibha Dadhich and anr.

Date : 2.5.2005

HON'BLE MR. PRAKASH TATIA, J.

Mr. Mahendra Trivedi, for the petitioner.

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Heard learned counsel for the petitioner.

The petitioner is aggrieved against the order dated 16.2.2005 by which the Judge, Family Court, Jodhpur rejected the petitioner's application filed under Order 18 Rule 4 CPC by which the petitioner prayed that in view of the judgment of Hon'ble Supreme Court in the case of Salim Advocate Bar Association Tamil Nadu vs. Union of India reported in AIR 2003 SC page 189 and in view of the judgment of Bombay High Court in the case of FDC Ltd. vs. Federation of Medical Representative Association reported in A.I.R. 2003 Bombay page 371, the evidence can be recorded as per the procedure provided in Order 18 Rule 4 CPC which provides for filing of affidavits of the parties and witnesses, the court can only examine the deponent whereas in the present case, the trial court held that in this case, it will be appropriate to record the evidence of the parties in the Court in view of the peculiar facts and circumstances of the case that certain allegations, which have been levelled in the divorce petition, are relating to

the effect of cruelty on the body and mind of the person concerned and for that purpose, it is necessary that the evidence be recorded in the Court.

According to learned counsel for the petitioner, the trial court observed that the petitioner wants to delay the proceedings and which is absolutely wrong and in fact, if the procedure as adopted by the Court will be allowed, it will cause delay in deciding the divorce petition. Therefore, the order deserves to be set aside.

According to learned counsel for the petitioner, the trial court has passed the order of this type only in this case and not in other cases. It is further submitted that the other party shall have opportunity to cross examine the witnesses and, therefore, the effect of cruelty on the person and mind of the person can be well assessed by the trial court after cross examination of the parties and the witnesses.

I have considered the submissions of learned counsel for the petitioner.

It is true that in view of the judgment of Hon'ble Supreme Court, the evidence is required to be by affidavit under Order 18 Rule 4 CPC even in appealable cases but there is no blanket bar against the Family Court for adopting a procedure which is necessary looking to the facts of a particular case and the allegations levelled in the petition. It cannot be ignored that the demeanour of

the witnesses is also a very important factor and cannot be taken lightly and it becomes necessary when the allegations are relating to the effect of cruelty. The effect of cruelty on the body of a person can be proved by other evidence like medical evidence etc. but so far as the effect on the mental condition is concerned, that can be more effectively assessed when the party himself gives evidence before the Court, may it be examination in chief or cross examination. That depends on the facts of each case and, therefore, deviation in the procedural matter which is needed in the opinion of the Court, is an order passed in judicial discretion of the court and cannot be said to be an order which has been passed beyond jurisdiction or arbitrary.

In view of the above, in the peculiar facts and circumstances of the case, I do not find any reason to interfere in the impugned order dated 16.2.2005 and even there may be some delay if the procedure as adopted by the Court is kept, but that does not mean that if the Court finds that it will be in the interest of justice, then that interest of justice cannot be defeated simply because there may be delay which can be avoided by effective control of the court over the case and by active participation and cooperation of the petitioner himself.

In view of the above discussion, I do not find any merit in this writ petition and the same is hereby dismissed.

However, the trial court is requested to see that this deviation of procedure should not result in delay of the disposal of the case and the petitioner undertakes to cooperate.

(PRAKASH TATIA), J.

S.Phophaliya